WONG HUA SEH

v.

DING KUONG HIING

HIGH COURT SABAH & SARAWAK, SIBU
IAN HC CHIN J
[ELECTION PETITION NO: 26-01-2008]
21 JULY 2008

ELECTION: *Petition - Corrupt practice of bribery or treating - Promise to build college in return for votes - Whether a promise to procure any office, place or employment - Whether element of bargaining found - Whether a legitimate promise for development - Election Offences Act 1954, ss. 8, 10(b), (c)*

The petitioner was the losing candidate in the 8 March 2008 general election for the Sarikei constituency in the state of Sarawak whilst the respondent was the winning candidate who won by a majority of 51 votes. The petition was based on the allegation that the respondent and one Tan Sri Paduka Ting Pek King ('TPK') committed corrupt practice of bribery or of treating under ss. 10(b), (c) and 8 of the Election Offences Act 1954 ('the Act'). As such, the election of the respondent should be declared void under s. 32(a) of the Act. The crucial point in the petitioner's case was that TPK made a promise in gatherings held prior to the general election that he would develop a college of higher learning called the Rahman College if the respondent got elected.

Held (dismissing the petition with costs):

(1) It was established beyond any reasonable doubt that TPK did promise that if the respondent was elected as the Sarikei member of parliament, TPK would build the college and that the promise was made in the gatherings concerned. (para 13)

(2) Whether the promise made fell foul of s. 10(b) of the Act, the petitioner must establish that the promise to build the college came within the meaning of the term of "promises to procure or to endeavour to procure any office, place or employment". That in turn depended on the meaning of the terms "office", "place" and "employment". All those terms presupposed that the person who offered such "office", "place" and "employment"

would benefit financially from the occupation of such positions. The petitioner did not argue or demonstrate to the court how the promise to build a college could amount to procure such an "office" or "place" or "employment". Therefore, the petitioner failed to establish a case under s. 10(b). (paras 13 & 14)

(3) The respondent was in the same gathering as TPK and TPK actively campaigned for the respondent. Further, after the election result was announced, the respondent acknowledged that TPK assisted in the campaign. It followed that TPK could be regarded as the respondent's agent with the tacit consent of the respondent. (para 14)

(4) The authorities did not support the petitioner's proposition that a bargain was struck with the voters following the promise made. The voters must be engaged in the negotiation regarding the building of the college and it must be shown that the voters demanded for such a college resulting in TPK giving that promise to build the college in return for their votes. All the respondent produced was evidence of the repeated promise and of what certain witnesses felt regarding the promise. What was needed was evidence of the bargaining that was lacking. The promise was a promise of development in the form of setting up the college and that was a legitimate form of campaigning. In the circumstances, the plaintiff failed to establish the offences of bribery under s. 10(b) and 10(c) of the Act. (paras 19, 20 & 21)

(5) The allegation of treating was confined to 25 February luncheon gathering where evidence was led that TPK or his friends had paid for food for 500 people. Under s. 8 of the Act it must first be established that the food was given in order to influence the voters. The petitioner did not elaborate how the luncheon reaped votes for the respondent. That must be established. There was no evidence that food was provided to influence the voting. The mere fact that food and drink was provided did not give rise to any inference that it was corruptly given to influence voting. Therefore, the petitioner failed to establish the offence of treating under s. 8 of the Act. (para 22)

(6) Since what was promised by TPK was only a legitimate promise of a form of development, there was nothing corrupt about the pamphlets that were distributed. Also, there was no element of bargaining. In any event in order to prove conclusively that the pamphlet was printed at the instance of the respondent or his agent or party, it was crucial to call someone from the company that printed the pamphlets and whose name was stated on the pamphlet. When the respondent and his agent gave evidence that they did not cause the same to be printed or distributed, it cast a doubt as to whether it was printed on their instruction or that of their party. The doubt could have been resolved if the petitioner had called someone from the printing company but he failed to do so resulting in a doubt and with the benefit of the doubt going to the respondent. (para 23)

Case(s) referred to:
Ali Amberan v. Tunku Abdullah [1969] 1 LNS 6 ***(refd)***
Coventy Case [1869] 1 O'M & H 97 ***(refd)***
Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi [1987] AIR 1577 ***(refd)***
Harjit Singh Mann v. S Umrao Singh & Ors [1980] AIR 701 ***(refd)***
Maganlal Bagdi v. Hari Vishu Kemath [1958] 15 ELR 105 ***(refd)***
Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 SC ***(refd)***
Ratten v. R [1972] AC 378 ***(refd)***
Tewkesbury Case [1857] 20 Dig 88 ***(refd)***
Wong Sing Nang v. Tiong Thai King [1996] 1 LNS 66 ***(refd)***
Worker's Party v. Tay Boon Too & Anor [1975] 1 LNS 193 ***(refd)***

Legislation referred to:
Election Offences Act 1954, ss. 8, 10(b), (c), 32(a), 32(c)

Other source(s) referred to:
Rameshwan Dal, *The Election Law*, 1997, 3rd edn, p 467

For the petitioner - Wong Ho Leng (Chong Siew Chiang & Alvin Yong with him); M/s Chong Brothers Advocates
For the respondent - Henry Ling Kuong Meng; M/s Ling & Wong Advocates

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

[1] The petitioner, Wong Hua Seh, was the losing candidate in 8 March 2008 general election for the Parliamentary Constituency of Sarikei (P208). Out of the 21,891 votes cast, the petitioner obtained 10,537 votes as against the 10,588 votes obtained by the winning candidate, the respondent Ding Kuong Hing who won by a majority of 51 votes. There were three other candidates but their results have no relevance to this petition. The petitioner wants the election of the respondent declared void.

[2] The petition was premised (1) on the allegation that the respondent or with his knowledge or consent, his agent and Tan Sri Paduka Ting Pek King ("TPK") had committed six instances of corrupt practice of bribery or of treating as understood under ss. 10(b), 10(c) and 8 of the Election Offences Act 1954 and that therefore the election of the respondent should be declared void under s. 32(c) and (2) relying on the same six instances, that even if those acts were not committed by the respondent or by the other persons with the knowledge of the respondent but because the general treating had so extensively prevailed in the election and so extensively committed by the respondent for the purpose of procuring or promoting the election of the respondent, the election of the respondent should be declared void under s. 32(a). But I will first remind myself of the relevant provision of the Election Offences Act 1954 and they read:

> **32. Avoidance of election on election petition**
>
> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election;
>
> (b) ...
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

8. Treating

Every person who, corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides or causes to be given or provided, or is accessory to the giving or providing, or pays or engages to pay wholly or in part, the expense of giving or providing any food, drink, refreshment or provision, or any money or ticket or other means or device to enable the procuring of any food, drink, refreshment or provision, to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at such election or on account of any such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at such election, and every elector or voter who corruptly accepts or takes any such food, drink, or refreshment or provision or any such money or ticket or who adopts such other means or device to enable the procuring of such food, drink, refreshment or provision shall be guilty of the offence of treating.

10. Bribery

The following persons shall be deemed guilty of the offence of bribery:

(a) ...

(b) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place or employment to or for any elector or voter, or to or for any person on behalf of any elector or voter, or to or for any other person, in order to induce such elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any elector or voter having voted or refrained from voting at any election;

(c) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election;

(d) ..

(e) ...

(f) ....

(g) ...

(h) ...; and

(i) ..

Whether TPK Promised That If The Respondent Was Elected TPK Would Build The College

[3] Crucial to one part of the petitioner's case is what TPK had actually said in all those gatherings alleged in the petition, that is on 25, 29, February, 2 & 4 March. I will deal first with what was alleged to have been said on 25 February which the petition said was this:

> At the said reception, Ting Pek Khiing addressed and promised them that if Ding Kuong Hiing were elected as the member of Parliament for Sarikei. Constituency, them Ting Pek Khiing would definitely construct Rahman College (widely known as TAR College) in Bintangor for the benefit of Bintagor.

For this purpose the petitioner gave notice that he will rely on the report appearing in 26 February issue of the See Hua Daily News which was made by the reporter Law Kim Chong and which agreed translation reads (after inverting the colour of the relevant part to highlight the same):

> See Hua Daily News Dated 26.2.2008 (Tuesday) A26
> The 12th General Election
> Polling date: March B8
>
> **Ting Pek Khiing promised to build**
> **Rahman College in Bintagor**
> **Should Ding Kuong Hiing be elected**
>
> (Report by this newspaper at Bintagor on the 25th), Tan Sri Datuk Paduka Dr. Ting Pek Khiing, an enterpreneur in our country promised that he would certainly strive for building Rahman College in Bintagor should Ding Kuong Hiing be elected as the Sarikei Member of Parliament.
>
> This was the statement he made today when we returned to his hometown Bintagor and gave a banquet in honour of the local people.

Tan Sri Datuk Ting Pek Khiing hoped that people in Bintangor would not feel doubtful about his promise. If the Sarawak United Peoples' Party candidate Ding Kuong Hiing wins the parliamentary election in the Sarikei constituency, he would certainly 'bring' Rahman College to Bintangor.

He emphasized that 15 years ago, the former Prime Minister Tun Dr Mahathir mentioned to him about the matter of building Rahman College in his hometown Bintangor. He had planned to implement the project in 1993 but it could not be realized as scheduled at that time and therefore, he hoped that the project concerned can be implemented after 15 years.

He said that at that time he spent RM30 million to buy a 200 acre plot of land to build Rahman College. However, because some people objected that a college is not suitable for Bintangor, hence the project was abandoned. However, the plot of land is still preserved.

Besides, he said that if Rahman College is successfully built in Bintangor, he will not solicit building funds from the local people. He will build Rahman College on the basis of RM1.00 by him and RM1.00 from the government.

When the Rahman College successfully built in Bintangor, the fees will also be on the basis of the student paying RM1.00 and the Goverment specially subsidizing RM1.00. This will enable more students to have the opportunity to receive higher knowledge.

He expressed the view that if Rahman College is successfully implemented in Bintangor it will not only bring about development and prosperity in the area, but also there will be a tremendous increase in the population, thereby bringing business opportunities and promoting economic development. At the same time, it will also benefit the people and the businessmen of Sarikei.

Undoubtedly, when the plan for Rahman College materializes, it will not only enable the local to enjoy inexpensive higher education end benefit the future generations, it will also increase the number of residential and shop houses and roads. This will give Bintangor a better future.

Tan Sri Datuk Ting Pek Khiing sincerely called on the people of Bintangor and Sarikei to give their full support to Ding Kuong Hiing, the SUP'P candidate for the Sarikei parliamentary constituency, to be elected as the Sarikei Member of Parliament so as to implement the project of building Rahman College in Bintangor and to bring "new hope" to Bintangor.

[4] If that accurately reported what TPK had said, then it proves that TPK had promised in his address at that gathering that if the respondent is elected TPK would build the college. Another reporter Chew Kuok Yew, of the United Daily News, was also present at the function and his report was published on 1 March issue which translation (with the relevant part highlighted) reading like this:

Ting Pek Khiing: If Ding Kuong Hiing Wins the election Rahman (College) to be built in Bintangor Recruit students this year

Photograph Vote Ding Kuong Hiing in exchange for Rahman College

(Report by this newspaper at Bintangor on the 29th) Tan Sri Paduka Dr. Ting Pek Khiing today announced that should Ding Kuong Hiing be elected, Rahman College would recruit students within this year.

Shop-houses to be used as temporary school buildings

He would use two rows of 4-storey shop-houses in Sarikei and Bintangor (the old cinema premises) as temporary school buildings to accommodate 1,000 students, 16 classrooms can be set up in the 4-storey shop-houses located at Court House Road, Bintangor, and the Rahman College branch campus can be built and completed in a year on the 3,000 acres of empty land at Mile 2 Kelupu Road. He stated that the 4-storey shop-houses in Sarikei would be used as Rahman College temporary branch campus to benefit the people in Sarikei.

Ting Rek Khiing appealed to the people in Bintangor and Sarikei that they must make decision beneficial to themselves and cast a sacred vote for Barisan Nasional.

Going without Rahman College, it is really very pitiful.

It is absolutely worthwhile by voting for Ding Kuong Hiing in exchange for Rahman College.

Ting Pek Khiing said that since he is prepared to contribute money and energy to build Rahman College. There is no reason why the voters will not accept.

Deputy Chief Minister Datuk Pattinggi Tan Sri Chan Hong Nam urged the people in Bintangor to make a wise decision to cast their sacred votes for Barisan Nasional's Ding Kuong Hiing.

> The people in Bintangor will decide their future destiny themselves.
>
> He believes that Ting Pek Khiing will honour his promise to builtdRahman College. He stressed that Rahman College is great news to the people of Bintangor and Sarikei. It will attract investors from various places to these areas. Bintangor is a small place but with the successful building of Rahman College, the population will be expected to increase by 20,000. Employment opportunities will increase thereby promoting prosperity locally.

Going by the report, it meant that TPK had promised to build the college if the respondent wins the election. The petitioner had also relied on a photograph of the respondent taken by this reporter under which ran the words "Vote Ding Kuong Hiing in exchange for Rahman College" but it was not stated by anyone as to whether those words were meant to convey that they were spoken by anyone or by TPK.

[5] The respondent had argued that the report is not admissible evidence in the absence of TPK's testimony. For this purpose, the respondent contended the evidence of the reporter and others present are hearsay and that he is still entitled to object to the same though it was not done during the time those evidence were sought to be admitted which latter contention is correct as *Malaysia National Insurance Sdn Bhd v. Malaysian Rubber Development Corp* [1986] 2 CLJ 285; [1986] CLJ (Rep) 185 held that hearsay evidence does not become admissible merely because no objection was taken earlier. But the issue is not that but whether what the witnesses said they heard what TPK said are hearsay evidence? In this regard the law is clear from the authorities cited by the respondent and I need refer only to *Ratten v. R* [1972] AC 378 where it held:

> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', that is, as establishing some fact narrated by the words.

A Clearly then, the evidence of witnesses who heard what TPK said is admissible as regards whether those words were uttered and not with, which we are not concerned with, whether what TPK said was the truth.

B **[6]** It was then argued that the precise or original words were not pleaded and proved. With regards to the pleading point, I have earlier referred to the fact that the petition had stated that 26 February issue of the See Hua Daily News will be relied on. In arguing this point the respondent had relied on *Worker's Party* C *v. Tay Boon Too & Anor* [1975] 1 LNS 193 which concerns a defamation case where the law says the exact words must be spelt out but the present case is concerned with an election.

[7] It was then argued that in the absence of tape recording or D other recording medium of the speech which TPK made, the veracity of the reporters or their impartiality cannot be tested, especially when what they have reported were from notes which they had taken down of the speech made by TPK and which notes were not produced. But the opportunity was made available E to the respondent to question these reporters who testified that they stood by the accuracy of what they had reported but it was not made use of. From the manner in which the case was conducted, the respondent had resigned himself to the fact that TPK had in deed promised the college if the respondent is elected F and this much the respondent himself admitted as can be gathered from the following questions to and answers by him:

Q: On all the occasions referred to when you were with Ting Pek King he said he will guarantee to build TAR if only you win and become rep of P208

G

A: Yes in most of them

Q: Did you object to what he said there and then

A: No

H

Q: Honestly you welcome him to say that

A: Yes

Q: 8 March result announced – did you or not tell the reporters that you wanted to thank Ting Pek King specially for what I he had done during the campaign

A: Yes, not only him and others as well

Therefore, with the evidence that have referred to I am satisfied beyond reasonable doubt that TPK did make the promise as alleged in the petition and I do not find it necessary to rely on the evidence of other witnesses who had said they heard TPK made that promise.

[8] I turn now 29 February gathering, where again another reporter Ngu Toh Lin made his report that was published in 1 March issue of the Sin Chew Daily News which translation reads (with the relevant part highlighted):

> Dated 1.3.2008 (Saturday) Sin Chew Daily Central Region
>
> To follow up the general election, just read Sin Chew Daily
>
> **Ting Pek Khiing: As long as Ding Kuong Hiing wins the election**
> **Rahman (College) can recruit students and start classes this Year**
>
> (Report at Bintangor on the 29th) Tan Sri Ting Pek Khiing promised that if Ding Kuong Hiing, the Barisan Nasional candidate contesting the Sarikei constituency is elected, he would immedialety built Rahman College branch campus and would recruit students to start classes this year expecting to take in 1,000 add students in the first stage.

[9] Ngu Toh Lin was not alone in covering this event as Law Kim Chiong was also present and the translation of the relevant part of his report which appeared in 1 March issue of the See Hua Daily News looks like this (with highlight added):

> **Ting Pek Khiing: As long as Ding Kwong Hiing is elected Rahman College recruit students this year**
>
> (Report by this newspaper at Bintangor on the 29th). An enterpreneur in the country Tan Sri Datuk Ting Pek Khiing, emphasized that as long as the Sarawak United Peoples' Party candidate Hiing is elected as the Sarikei Member of Parliament, then he would build Rahman College in Bintangor and proceed to recruit students within this year.
>
> Tan Sri Datuk Ting Pek Khiing said the project of building Rahman College branch campus in Bintangor has receive approval and support from the states government, Malaysia Chinese Association Sarawak United Peoples' Party and the Prime Minister Datuk Seri Abdullah Ahmad Badawi.

A Approved by state government and Prime Minister

He pointed out that the only condition for him to build Rahman College in Bintangor is that the SUPP candidate Ding Kuong Hiing must enjoy the support from the people and win the parliamentary election in Sarikei constituency. Therefore, he prayed
B that the people help him to realize the project concerned.

[10] Again, these reporters were not challenged when they asserted the accuracy of their reports and which I find beyond any reasonable doubt to be an accurate report of what TPK had
C said at that function.

[11] The next gathering where TPK was alleged to have said the same thing was on 2 March at a civic centre, Central Road, Sarikei and this time round the events were covered by the
D reporters Huang Tiong Kang (for the See Hua Daily News) and Yii Yuk Seng (for the United Daily News) whose translations (with highlights added) looked like this

See Hua Daily News Dated 3rd March 2008 (Monday) A3
The 12th General
E Election
Polling date: March 8

Ting Pek Khiing reiterates that if Ding Kuong Hiing wins the election
Rahman (College) will recruit students immediately and start courses
F

Photograph. After visiting designated temporary school buildings of the Rahman College Tan Sri Datuk Dr. Ting Pek Khiing and Mrs (Center), Datuk Teng Lung Chi BN candidate for Sarikei Ding Kuong Hiing (left) and leaders of various societies appealed
G the people to support The Barisan Nasional.

(Report by this newspaper at Sarikei on the 2nd). The big enterpreneur of our country, Tan Sri Datuk Dr. Ting Pek Khiing, reiterated that if the Barisan Nasional candidate for the Sarikei
H parliamentary constituency Ding Kuong Hiing wins, Rahman College will immediately recruit students and start courses. The former Cathay Theatre at Centre Road, Sarikei which has been converted into six shophouses and fixed with fire prevention installations and elevators will be used as temporary school buildings of the Rahman College.
I

United Daily News Dated 4th March 2008 (Tuesday) B12

To build Rahman College if Ding Kuong Hiing
wins the general election
Ting Pek Khiing guaranteed to fulfill promise

(Report by this newspaper at Sarikei on the 3rd). A famous entrepreneur in our country Tan Sri Ting Pek Khiing this morning assured the people in Sarikei that as long as Ding Kuong Hiing, the Barisan Nasional Sarawak United Peoples' Party candidate wins the March 8 Parliamentary election, he will certainly build Rahman College and construct the 30KM-long Sarikei Tanjong Manis Highway

He said it is not a dream to bring in Rahman College and in fact, the conditions for carrying out these two projects are all ready. Now, it all depends on whether the people have the sincerity to accept it or not and depends on whether Ding Kuong Hiing will win or not.

The promise to build the college is implicit in the statement that recruitment of the students can be started immediately. Again for the same reasons which I have earlier stated in respect of the other gatherings, I find that it has been established beyond reasonable doubt that TPK had promised the college if the respondent is elected.

[12] The final gathering where TPK was said to have made the said promise was at a gathering on March 4 at Mile 2 1/2 Kelupu Road, Bintangor and which was reported by Law Kim Chiong but he said that he did not hear anyone make any speech and he only got the information from the workers who were present there. Therefore, as regards this date, it has not been established that TPK made the alleged promise and what was reported was hearsay.

[13] To sum up, I am satisfied beyond any reasonable doubt that TPK did promise that if the respondent is elected TPK would build the college and the promise was made in 25 February, 29 February and 2 March gatherings. I turn now to consider whether such a promise was a corrupt practice of bribery under s. 10(b) and 10(c) or whether treating it as under s. 8 of the Election Offences Act 1954.

Whether Such A Promise Was An Offence Under The Election Offences Act

[14] It will be recalled that the petitioner alleged that such a promise firstly falls foul of s. 10(b) which says:

> **10. Bribery**
>
> The following persons shall be deemed guilty of the offence of bribery:
>
> (b) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place or employment to or for any elector or voter, or to or for any person on behalf of any elector or voter, or to or for any other person, in order to induce such elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any elector or voter having voted or refrained from voting at any election;

To succeed under s. 10(b), the petitioner must establish that the promise to build the college comes within the meaning of the term of "promises to procure or to endeavour to procure, any office, place or employment". This in turn depends on the meaning of the terms "office", "place" and "employment". Merriam-Webster Online defines those words as meaning:

office:

> 1a: a special duty, charge, or position conferred by an exercise of governmental authority and for a public purpose: a position of authority to exercise a public function and to receive whatever emoluments may belong to it b: a position of responsibility or some degree of executive authority

place:

> 9a: remunerative employment

employment:

> 2a: activity in which one engages or is employed <seeking gainful employment> b: an instance of such activity

All those terms presuppose that the person who offered such "office", "place" and "employment" would benefit financially from occupying such positions. That being the case, the offer to build a college which brings no financial gain to a voter cannot amount to a promise the voters or any of them an "office" or "place" or "employment". The petitioner's counsel did not argue or demonstrate to the court how the promise to build a college can amount a promise to procure such an "office" or "place" or "employment".

Therefore, the petitioner fails to establish a case under s. 10(b). In case I am wrong, I am of the view that giving the presence of the respondent in the same gathering as TPK and actively campaigning for the respondent and the acknowledgement by the respondent after the election result was announced of the assistance of TPK in the campaign, TPK can be regarded as the agent of the respondent and to have made the promise with the tacit consent of the respondent. (See *Ali Amberan v. Tunku Abdullah* [1969] 1 LNS 6) In any event the petitioner would also fail for the reason that the element of bargaining was not established and what I said later regarding this point applies as well with regard to the s. 10(b) offence.

[15] Does that promise fall fouls of s. 10(c), which the petitioner contended it does, which says:

> **10. Bribery**
>
> The following persons shall be deemed guilty of the offence of bribery:
>
> (c) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election;

The petitioner contended that the promise to build the college on condition that the respondent is elected together with TPK inspection of the site and the temporary classrooms, attending the earth-breaking ceremony and promising the start of the classes within the year, shows the corrupt motive of TPK which was to induce the voters to vote for the respondent. For that purpose the petitioner relied on *Maganlal Bagdi v. Hari Vishu Kemath*

[1958] 15 ELR 105. The facts of that case were briefly that a candidate had addressed a crowd which included villagers who faced a shortage of water supply to their village and who asked for a well to be dug following which a consecration was performed followed by a promise to construct the well after the election. Another authority relied on is *The Election Law* by Rameshwan Dal 3rd edn 1997, p. 467 where "An offer or promise by a candidate to repair and renovate a Durgha with the object of inducing Muslim voters in the locality to help him in his election amounts to a promise under the sub-section." It is common ground, and as was present in *Maganlal Bagdi v. Hari Vishu Kemath*, that there must be an element of bargaining like what the villagers did when they asked for the well to be built in return for voting for the candidate. That the element of bargaining must be present before a promise can be said to be a bribery is clearly set out in *Harjit Singh Mann v. S Umrao Singh & Ors* [1980] AIR 701 where it is said:

> It is an essential ingredient of the definition of corrupt practice of "bribery" that the gift, offer or promise should be by the candidate or his agent or by any other person with the consent of the candidate or his Election Agent. The trial court rightly took the view that it was necessary for the purpose of proving the corrupt practice of bribery to establish that there was an element of 'bargaining' in what the respondent was alleged to have done for two villages. When the element of bargain was completely absent from the allegation against the respondent, the trial court was justified in holding that the alleged corrupt practice had not been established. *Ghasi Ram v. Dal Singh and Others* [1968] 3 SCR 102, *Amir Chand v. Surendra Lai Jha and Others* 10 ELR 57, *Om Prabha Jain v. Abnash Chand and Another* [1968] 3 SCR 111; *Bhanu Kumar Shastri v. Mohan Lal Sukhadia and Others* [1971] 3 SCR 522; *Chaitanya Kumar Adatiya v. Smt Sushila Dixit and Others* [1976] 3 SCC 97.

(See also *Wong Sing Nang v. Tiong Thai King* [1996] 1 LNS 66.)

[16] In arguing that the element of bargain existed, the petitioner's counsel said this:

> **Element of Bargain**
>
> It is submitted that the promise to build TAR college made during the four meetings as hereinabove submitted and the promise made in the pamphlet Ex P9 has caused the people to vote for the 2nd Respondent thereby satisfying the element of "bargain". The evidence given by the witnesses to that effect are:

(i) PW3 (a SUPP member) in cross-examination testified as follow (at page 33 lines 10 to 17 Notes of Proceedings):

Q What does P9B says

A If there is Ding there is TAR

Q What is wrong with that

A Some influence on the public

(ii) PW5 in cross-examination said (at page 36 lines 21 to 21 Notes of Proceedings),

> The six big characters meant if Ding wins the election then Rahman college will be built I was influence by the pamphlet to vote for the college.

(iii) PW7 said hi cross-examination (at page 38 lines 11 to 21 Notes of Proceedings), "... If Ding wins the election we have Rahman college"

> Put Notwithstanding pamphlet voters can vote freely for any candidate
>
> A Pamphlet result will be that people will vote for BN.

[17] As against that, the respondent had referred to *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi* [1987] AIR 1577 where it was alleged that the returned candidate, his mother and workers with their consent promised through the newspapers, pamphlets and speeches that the voters should cast their votes for the candidate for the sake of progress and development in the constituency. The Supreme Court there held that it was always open to a candidate or his supporter to appeal to the electors to vote for a particular candidate for the development and progress of the area, and such statement amounted to a representation which was a legitimate one and hence not an offence of bribery and undue influence was committed. Singh J in the Supreme Court at pp. 1591-1592 (para. 24) said:

> Sub-paragraphs (A) and (C) of paragraph 53 (I) of the election petition alleged that Rajiv Gandhi and Smt. Indira Gandhi and their workers with the consent of Rajiv Gandhi and Smt. Indira Gandhi made promise through newspapers, pamphlets and speeches that voters should cast their vote in favour of Rajiv Gandhi for the development of Amethi because his victory will

A ensure progress and development. Further Rajiv Gandhi and Smt. Indira Gandhi and the workers of Rajiv Gandhi in all their speeches and particularly Smt. Indira Gandhi in her speech of 11.6.1981 said that for the development of Amethi Constituency they should vote for Rajiv Gandhi. On account of these speeches
B voters could not cast their vote impartially, instead they cast their vote in favour of Rajiv Gandhi. Since Rajiv Gandhi and Smt. Indira Gandhi both attended the meetings together voters got the impression that as Smt. Indira Gandhi was Prime Minister and her son Rajiv Gandhi was a candidate, there was bound to be development of Amethi area if Rajiv Gandhi was elected. These
C allegations merely amount to representation being made by Smt. Indira Gandhi and the returned candidate and his workers that if Rajiv Gandhi was elected the constituency would be developed. Such a statement of promise is a legitimate one and it does not fail within the definition of bribery or undue influence under
D Section 123(1)(A) or 123 (2) of the Act. A candidate, his workers and supporters have every right under the law to canvass for the success of a particular candidate saying that if elected he would work for the development of the constituency. Such a promise does not in any way interfere with the free exercise of electoral right of the electors. Smt. Indira Gandhi who was the leader of
E the party was entitled to ask the electors to vote for Rajiv Gandhi and the fact that she was the Prime Minister made no difference to her to make an appeal of that nature. There is no allegation that there was any element of bargaining or undue influence in making appeal to the voters for casting their vote in favour of
F Rajiv Gandhi.

[18] Another case illustrative of the bargaining element is *Harjit Singh Mann v. S Umrao Singh & Ors* [1980] INSC 232 where the relevant part reads:

G ... As regards the alleged distribution of cheques on May 25 and May 27, 1977, it will be enough to say that even if it were presumed that the respondent was allowed to do so after he ceased to be a Minister, the mere delivery of cheques could not possibly amount to bribery when, as has been state, there was no element of bargain and regard to it.

H

It may be mentioned that the trial court rightly took the view that it was necessary for the purpose of proving the corrupt practice of bribery to establish that there was an element of "bargaining" in what the respondent was alleged to have done for Bara Pind
I and Littran. Reference in this connection may be made to the decision of this Court in *Ghasi Ram v. Dal Singh and Others* where

> it was held with reference to the decision in *Amirchand v. Surendra Lal Jha* and others that if a Minister redress the grievances of a class of the public or people of a locality or renders them any help, on the eve of an election, it is not a corrupt[t] practice unless he obtains promises from the voters in return, as a condition for his help. It was also held that the "evidence must show clearly that the promise or gift directly or indirectly was made to an elector to vote or refrain from voting at an election", and that "if there was good evidence that the Minister bargained directly or indirectly for votes, the result might have been different …

[19] What the petitioner had argued was that because the promise was made, it must follow that a bargain was struck with the voters but the cases cited by the respondent and which I have just referred to do not support that proposition made on behalf of the petitioner. Even the ordinary meaning of the word "bargain" or "bargaining" does not admit of the proposition of the petitioner as Merriam-Webster Online definition will show, *viz*.:

> instransitive verb 1: to negotiate over the terms of a purchase,agreement, or contract: HAGGLE 2: to come to terms: AGREE transitive verb 1: to bring to a desired level by bargaining <bargain a price down> 2: to sell or dispose of by bargaining
>
> – bar.gain.er noun
>
> – bargain for
>
> : EXPECT <more work than I bargained for>

[20] The voters must have been engaged in the negotiation regarding the building of the college and it must be shown that the voters have demanded for such a college resulting in TPK giving that promise to build the college in return for their votes. All that the petitioner produced was evidence of the repeated promise and of what certain witnesses felt regarding the promise but what was needed was evidence of the bargaining which was lacking as there is absolutely no evidence that any voter was involved in such bargaining. The most the promise can amount to was a promise of development in the form of setting up the college in Bintangor which is a legitimate form of campaigning.

[21] What I have said with regard to the absence of the element of bargaining applies as well to the gatherings on 29 February, 2 March and 4 March (assuming that I am wrong as regards whether there was any first hand account of that 4 March event). This means that the petitioner had failed to establish the offences of bribery under s. 10(b) and s. 10(c) as alleged in the petition. I turn now to the allegation of the offence of treating under s. 8 which it will be recalled reads:

> **8. Treating**
>
> Every person who, corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides or causes to be given or provided, or is accessory to the giving or providing, or pays or engages to pay wholly or in part, the expense of giving or providing any food, drink, refreshment or provision, or any money or ticket or other means or device to enable the procuring of any food, drink, refreshment or provision, to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at such election or on account of any such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at such election, and every elector or voter who corruptly accepts or takes any such food, drink, or refreshment or provision or any such money or ticket or who adopts such other means or device to enable the procuring of such food, drink, refreshment or provision shall be guilty of the offence of treating.

[22] The allegation of treating was confined to 25 February luncheon gathering where evidence was led that TPK or his friends had paid for food for 500 people. Under s. 8, it must be established that the food was given in order to influence the voters to vote for whom or whom not to vote. The petitioner's counsel did not elaborate how the luncheon had reaped votes for the respondent which must be established as said in *Schofield's Election La*, vol. 1, Shaw & Sons 2nd Edn (1996) referred to *Tewkesbury Case* [1857] 20 Dig. 88, 677 and said (which I respectfully agree):

> For to prove treating to be corrupt it is necessary to prove that some person has been thereby corrupted and induced by such treating to vote for the sitting member.

There was no evidence that the food was provided to influence the voting. The mere fact that food and drink was provided does not give rise to any inference that it was corruptly given to influence voting as was said in the *Coventy Case* [1869] 1 O'M & H 97, per Willes J at p. 106:

> Eating and drinking must go on, notwithstanding an election coming, in the ordinary and usual course. When eating and drinking takes the form of enticing people for the purpose of inducing them to change their minds, and to vote for the party to which they do not belong, then it becomes corrupt, and is forbidden by the statute. Until that arrives the mere fact of eating and drinking, even with the connection which the supper had with politics, is not sufficient to make out corrupt treating.

Therefore, the petitioner had also failed to establish the offence of treating under s. 8. I turn now to the pamphlets.

[23] It was established that certain people wearing BN badges on whose ticket the respondent was standing had distributed a Chinese pamphlet, a translation of which reads:

(Confined to the circled portions)

(Photograph)

Datuk Teng Lung Chi (from left), Tan Sri Law Hieng Ding, Ding Kuong Hiing, Tan Sri Ting Pek Khiing, Puan Sri Wong Sui Choo, Ngui Soon Leng and others exclaimed excellence with their thumbs up in front of the model of Rahman College

Should Ding Kuong Hiing Win in Sarikei
Ting Pek Khiing: I build Rahman College

(Extracted front Sin Chew Daily dated 26.2.2008)

Prime Minister supports building Rahman College

Vote Kuong Hiing to have it Materialized

When there is Kuong Hiing, there will be Rahman (College)

Speedy development in the locality needs participation and mutual support from and between the government and private sector. In order to shape Bintangor into an education town, a big entrepreneur in our country, Tan Sri Ting Pek Khiing, said that he had decided that should the Barisan Nasional candidate for the

A Sarikei parliamentary constituency Ding Kuong Hiing win the election, he will implement the project of setting up Rahman College in Bintangor and to let this region have a high level education institution on a one to one basis, that is to say, Tan Sri Ting Pek Khiing shoulders one Ringgit, the government would subsidize one Ringgit. The people in Sarikei and Bintangor do not have to bear a sen for the project which would benefit our children's education. However, it is vital to ensure the victory of the Barisan Nasional candidate Ding Kuong Hiing.

On the other hand, Rahman College, if successfully set up, would bring in unlimited business opportunities. Besides enhancing the opportunity of further education among the students and easing the heavy financial burden, it would also bring in 20,000 students to further their study here and would form a big consumption market to mould speedy economic growth. By that time, housing development, agricultural products market, transport industry, hawkers and all walks of lives would be benefited. At the same time, business circle and all other fields would be benefited as well. Therefore, voters must make the right choice in the present general election in giving full support to the Barisan Nasional candidate Ding Kuong Hiing for realizing the hope of the people – Rahman College.

Sarawak United Peoples' Party Publicity Office
3.3.2003

www.supp-dkh.net Ding Kuong Hiing

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Since I am of the view that what was promised by TPK is only a legitimate promise of a form of development for Bintangor, there is nothing corrupt about it as also there was no element of bargaining. In any event, in order to prove conclusively that the pamphlet was printed at the instance of the respondent or his agent or party, it is crucial to call someone from the company that printed the pamphlets and whose name was stated on the pamphlet. When the respondent and his agent gave evidence that they did not cause the same to be printed or distributed it cast a doubt as to whether it was printed on their instruction or that of their party. The doubt could have been resolved if the petitioner had called someone from the printing company but he failed to do so resulting in a doubt and with the benefit of the doubt going to the respondent.

[24] Given that I have found there was no general bribery or treating, there is therefore no question of declaring the election void either under s. 32(a) or under s. 32(c).

Conclusion

[25] In the premise the petition is dismissed with costs to the respondent. The respondent is duly elected.